

**United States Court of Appeals  
FOR THE NINTH CIRCUIT**

**COUNTY OF SAN DIEGO and  
THE CITY OF SAN DIEGO,  
Appellants,**

v.

**UNITED STATES OF AMERICA,  
Appellee,**

and

**CHARLES W. CARLSTROM,  
SOUTHERN CALIFORNIA CHILDREN'S  
AID FOUNDATION, INC., a corporation,  
SOUTHERN CALIFORNIA DISTRICT  
COUNCIL OF THE ASSEMBLIES OF GOD,  
INC., a corporation, and THE SALVATION  
ARMY,  
Appellees.**

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**BRIEF FOR APPELLEES.  
CHARLES W. CARLSTROM, ET AL.**

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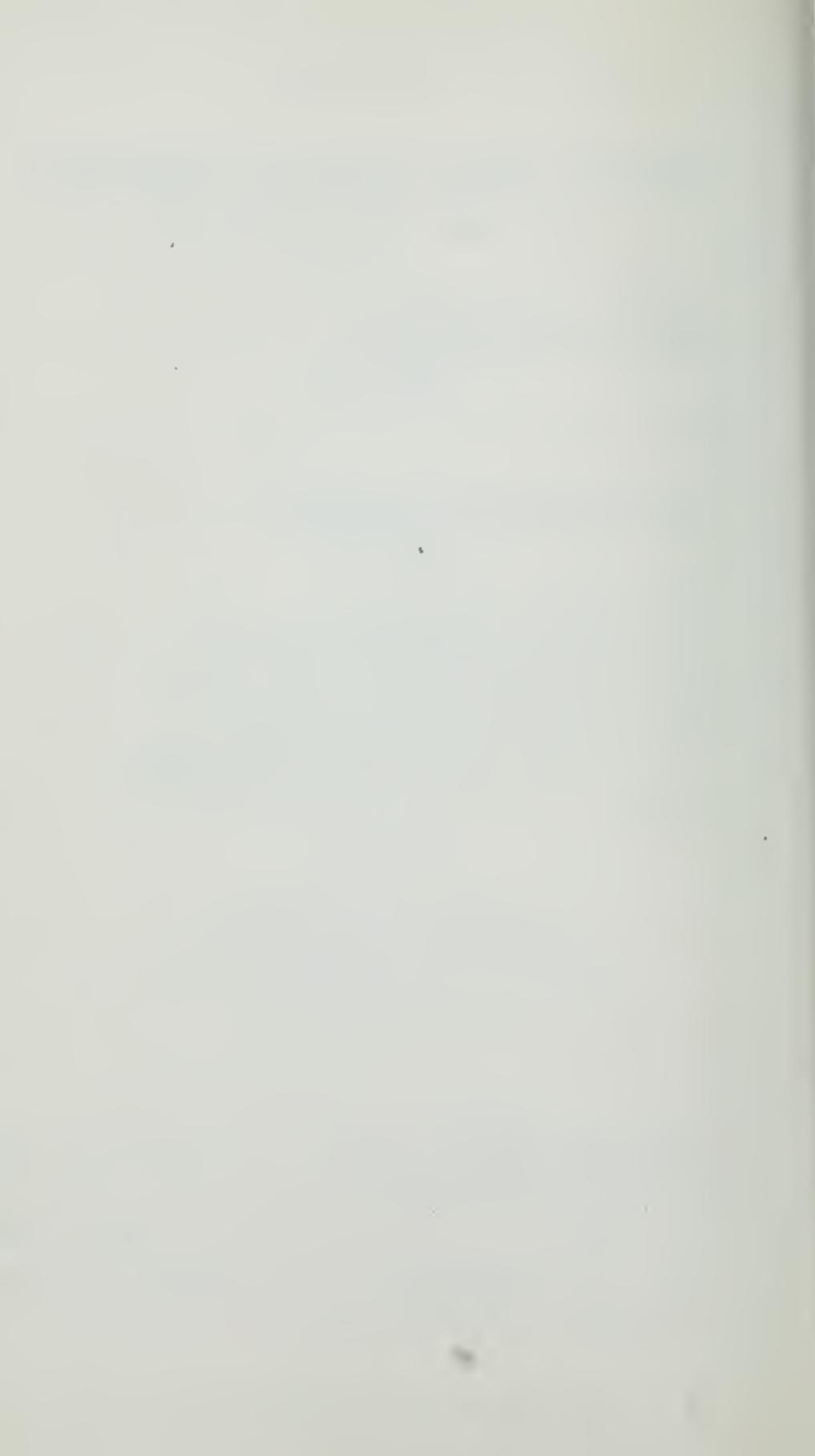
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## TOPICAL INDEX

	Page
THE QUESTION ON APPEAL AND STATUS OF FORMER OWNERS .....	2
COMMON INTEREST OF GOVERNMENT AND FORMER OWNERS .....	3
SOURCE AND PURPOSE OF FEDERAL COURT POWERS .....	4
CALIFORNIA TAX CALENDAR .....	9
APPELLANTS' CITATIONS DISTIN- GUISHED .....	13
CALIFORNIA STATUTES DO NOT PRO- VIDE FOR, BUT INSTEAD FORBID TRANSFER .....	14
CANCELLATION IS MANDATORY ON GOVERNMENT TAKING .....	16
INVOLUNTARY SELLER IS ENTITLED TO JUSTICE AND REASON AS WELL AS VOLUNTARY .....	18
NO GIFT OR TAKING WITHOUT PROCESS INVOLVED .....	19

## TABLE OF AUTHORITIES CITED

	Page
CASES	
Cal. Emp. etc. v. Payne, 31 Cal. 2d 216 ....	19
Carter v. Seaboard Finance Co., 33 Cal. 564 (Syl. 10, 9B p. 573) .....	17
City of Los Angeles v. Superior Court, 2 Cal. 2nd 138 .....	13, 14
Hochfelder v. L. A. County, 126 Cal. 2nd 370 (Syl. 4, p. 375) .....	17
Marin Metropolitan Water District v. North Coast Water Co., 40 Cal. App. 260.....	14
Security First National vs. Supervisors, 35 Cal. 2d 323 .....	17
Sherman v. Quinn, 31 Cal. 2d 661 .....	17
Thibodo vs. U.S., 187 F.2nd 249 .....	15
U. S. v. Certain Lands, 40 F. Supp. 436 (443) .....	15
Vista Irr. Dist. v. Supervisors, 32 Cal. 2d 477 .....	17
Weston Investment Co. v. Calif., 31 Cal. 2, 390 .....	13
Wilson v. Belville, 47 A. C. 857 .....	14

## TABLE OF AUTHORITIES CITED (Continued)

	Page
CODES	
California Code of Civil Procedure	
Section 1252.1 .....	6, 7, 11, 16, 19
Section 1248 .....	13, 14, 16
California Revenue and Taxation Code	
Sections 117, 201, 202, 405, 407 .....	9
Section 1843 .....	9
Sections 2151, 2152, 2186, 2187 .....	10
Sections 2192, 2193 .....	10, 12
Section 2194 .....	10, 12, 13
Sections 2601, 2605, 2606 .....	10
Sections 4986 .....	6, 10, 16, 19
Section 4986.2 .....	6, 19
U. S. Code, Title 40, 258 (a) .....	5, 6, 12, 15, 17, 19



No. 15352

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BRIEF FOR APPELLEES,  
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## THE QUESTION ON APPEAL AND STATUS

### OF FORMER OWNERS

The sole question involved in the two appeals taken in this matter is:

What has become of the tax lien on the condemned property and the tax liability of its former owners as a consequence of taking by the United States ?

The lower court adjudged that the lien and the liability are both dissolved. The County of San Diego and the City of San Diego contest this, and argue that the lien has attached to the fund payable to the former owners and that the liability still resides with them.

The United States and the former owners deny both contentions and undertake to sustain all the terms and effect of the Nunc Pro Tunc Judgment as of July 10, 1956. The views of the United States were advanced in the Court below upon its Motion for Summary Judgment and by the original owners of the property upon their motion to strike the answer of the County and City which set up the tax lien and demanded its payment out of the amount awarded by the jury.

We regard the motion to strike (filed by predecessor attorneys, who also took the appeal for the former owners) to amount to a general demurrer. This was overruled by the lower court which then proceeded to render judgment for the owners, so that their motion and appeal are of no further moment.

The Nunc Pro Tunc Judgment, effecting adjudication

of the rights of the owners in respect to tax liability, is of vital interest. Had it been adverse we should have appealed. Being favorable, we heartily join the government in its effort to sustain the judgment. We cannot see that the effect of this final judgment is in any way weakened by the fact that it was procured on motion of the plaintiff or that appellants' application for the same relief by way of motion to strike was not granted.

The judgment Nunc Pro Tunc was rendered after notice to all parties and after argument from all angles. It is just as binding on the owners as upon the government and upon the municipalities. Accordingly this brief properly constitutes an answer to the brief for appellants County of San Diego and the City of San Diego, on Appeal, although Carlstrom and his associate owners were originally denominated appellants rather than appellees.

COMMON INTEREST OF GOVERNMENT

AND FORMER OWNERS

Appellants, County and City, make some show of objection against the right and propriety of the Government's interest in this behalf, but they must concede the right of the former owners to defend the full amount of their award and their freedom from personal liability. It is not requisite for this that we sustain the validity of our motion to strike. It is enough that we sustain the equity and justice of the final judgment which is under attack by the County and City.

Strictly speaking, the Government has no interest in distribution of the award. It does have an indirect

interest in behalf of its citizens and a more direct interest in protecting itself in future condemnation cases from any tendency of congress, juries or judges to throw into the considerations of a jury the factor of prepayment of taxes as an element of value to the property. Under the present laws and practice, of course, it is not proper that a court or a jury take into account, in fixing value, any tax penalty which might fall upon the original owner.

If the result of this appeal or others should be to require such an owner to pay to taxing authorities "un-earned" taxes for which he will never derive benefit, it will become appropriate to have legislation which will shift the burden to the condemner. The contentions of the County and City demand inequity and we take it that the Government, for its own future financial protection, may well file and maintain its appeal which is designed also to promote equity and fair dealing, even toward an adversary party in the present litigation.

In any event, it is the desire and duty of this court to administer justice to all parties without regard to the source from which the point is raised and without regard to the particular form in which it came up in the court below or upon appeal to this court.

#### SOURCE AND PURPOSE OF FEDERAL

#### COURT POWERS

The trial court is, by the Federal Statute, given wide latitude in its disposition of the fund contributed by the condemner.

"The court shall have power to make such

"orders in respect of incumbrances, liens, rents, taxes, assessments, insurance, and other charges as may to it be just and reasonable."

U. S. Code, Title 40, 258 (a).

Appellants, and, we must concede, many court decisions loosely allude to this comprehensive power of the court as a "transfer" of a tax lien from the real estate to the fund deposited or to be deposited. Some state statutes doubtless provide for this, but not so in California. We have no fault to find with the attorneys of the taxing authorities, or indeed with the County and City officials, for their endeavor to garner for the local treasury a windfall in the way of unearned tax money. It is doubtless their duty to pursue a technicality to that end. On our part we feel free to condemn any strained construction of court decisions or statutory law which would require an owner to pay taxes on real property which are not payable or even ascertained until long after the real estate has passed into an untaxable domain. Such, according to the contentions of the appellants, would be the effect of the inchoate lien which attached March 7, 1955, as the initial step in raising tax money to be expended during the fiscal year July 1, 1955, to June 30, 1956.

Appellants depend primarily upon the assertion in their brief that "the passing of title effects a transfer of the lien from the land to the deposit". (Brief, p. 14) They cite no statute, State or Federal, which so declares. We are unaware of any legislation to such effect. The court decisions, cited by appellants, which use such language do so with the evident intention of characterizing the final effect of the equitable and just order which the

the trial court, sitting in the specific condemnation case, made under the particular facts and law of that case. There is no law which operates to create an automatic transfer of a tax lien on land to moneys deposited in the court registry.

Neither is there any law which requires that a court shall recognize and decree such a transfer where it will not be in furtherance of justice and equity. U. S. Code Title 40 Sec. 258 (a) contains the full authority under which Judge Carter exercised his judicial discretion in this case. Naturally, in so doing he took into account all statutory and judicial law of the State of California in which the land lies. He took into account the inequity of appellants' demand for unearned tax money. He took into account the same "statutes involved" as are quoted in appellants' brief. (P. 3-9). He took into account the equitable and just intentions of the California legislature as manifested in Sec. 4986 and Sec. 4986.2 of the California Revenue and Taxation Code as well as in the California Code of Civil Procedure Sec. 1252.1, all of which were in full force and effect on the date of taking.

Whatever statutes and whatever factual circumstances may have existed in the multitude of other decisions in other cases, we submit that the court below was confronted with no dictate of equity and no statutory restriction which required it to enrich the County of San Diego or the City of San Diego at the expense of either the United States of America or the private owners of the land condemned by it at a time when it was impossible for anyone to pay the taxes.

The California Revenue and Taxation Code, Secs. 4986, 4986.2 (quoted pp. 4-6 Brief of Appellants)

manifests the intention of the California Legislature to clear land taken by the United States, as well as the United States itself, of all liability which has attached by way of tax lien.

California Code of Civil Procedure 1252.1 manifested a like intention except in the case where the fiscal year had already begun to run at the date of taking. In our case the lien attached March 7, 1955. Title passed to the Government June 16, 1955. The fiscal year commenced July 1, 1955. Taxes became due and payable November 1955, so there was no occasion for prorating.

Despite appellants' criticism of the form of Code of Civil Procedure 1252.1, the substantive portion thereof justified the Federal court in its complete cancellation of the 1955 tax levy. Except for the next to the last paragraph (See Appellants' Brief, p. 8) the provisions of the section are purely procedural as to the manner in which a portion of a tax levy may be preserved to the benefit of the taxing agency. It is conceded, in our case, that the fiscal year had not commenced to run, so the whole tax was "unearned" at the time of taking. Therefore, even in a California state condemnation there could have been no order for payment of a pro-rate based on the fiscal year, and the State court would have been obliged to carry out the instruction of the statute, " \* \* \* and said judgment shall, in addition to ordering said payments, order the cancellation as of the date of judgment, of all taxes, current and delinquent, and all penalties and costs on said property \* \* \*. Cal. Code of Civil Procedure 1252.1 (Emphasis added)

Since it thus appears that under the California law in effect June 16, 1955, a California court was forbidden

by statute to require payment out of the award of any lien except on the basis of prorating it over a fiscal year which had started to run prior to passing of title, the lower court has followed the statute in the Summary Judgment. Date of passing title would, of course, be the date of judgment in the State court, whereas it is date of taking in the Federal court.

The City and County authorities, in their quest of revenue, are now encouraged by their learned legal advisors to believe that they may collect taxes upon Federal lands which are in exempt classification. According to the views expressed in their brief, it is only necessary that the Government shall acquire the property immediately after the first Monday in March rather than immediately before that lien date; that is to say, in the year 1955, if title passed March 6, the property goes untaxed. If title passed March 8, - or thereafter before the fiscal year began as in our case - the taxing authorities come into \$333,164.34.

If a City or a County may thus scoop up bounty from the sea by dropping a net overboard months in advance of the commencement of each fiscal year, they might as well impose the lien a full year before and so encompass even more passing schools of fish! Such happy windfall would come about without regard to the fiscal year and without regard to the benefits and services supposed to be provided by the taxing authorities throughout that period, to be paid for through the tax collection becoming payable November 1st following. Thus we feel secure in referring to the taxes for a fiscal year to commence July 1st as "un-earned".

## CALIFORNIA TAX CALENDAR

Appellants quote in their brief (P. 3-9) various excerpts from California laws, as "Statutes Involved". Others should be noted, namely, the whole annual tax program of California. It comprises many steps by which expenses of the fiscal year are to be raised. Attaching of the lien determines no amount and permits of no payment. The first Monday in March is merely the starting point and if the matter rested there no tax would ever be levied and no sum would ever become due.

We refer for sequence purposes to the following statutory provisions found in the California Revenue and Taxation Code:

Sec. 117 defines the "lien date" as the time when taxes for any fiscal year become a lien.

Sec. 201 provides that all property in the State is subject to taxation except such as is exempt under the laws of the United States or of California.

Sec. 202 refers to the Constitutional exemptions from taxation concluding with "(e) property that is exempt under the laws of the United States".

Sec. 405 requires the Assessor to fix the assessed value of all property during March, April, May and June.

Sec. 407 requires the Assessor to transmit his statistical statement to the Supervisors.

Sec. 1843 requires the Auditor to amend the rolls in accordance with any action by the Board of Equalization.

Sec. 2151 requires the Board of Supervisors to fix the tax rate.

Sec. 2152 requires the Auditor to compute and enter the tax against respective properties.

Sec. 2186 declares that every tax has the effect of a judgment against the person.

Sec. 2187 declares that every tax on real property is a lien against the property assessed.

Sec. 2192 declares that all tax liens attach annually as of noon the first Monday of March preceding the fiscal year for which taxes are levied.

Sec. 2193 declares that every lien has the effect of an execution duly levied against the property subject to the lien.

Sec. 2194 declares that such judgment may be satisfied and the lien be removed "when and not before" (a) the tax is paid or legally cancelled, or (b) the property is sold or deeded to the State for non-payment.

Sec. 2601 requires the Auditor to transmit the roll to the Tax Collector.

Sec. 2605 declares the first half of the tax due and payable November 1.

Sec. 2606 declares the second half due and payable January 20.

Sec. 4986 provides for cancellation of all or any

portion of an uncollected tax where manifestly it would be improper to collect it; as where it was levied or charged (a) more than once, (b) erroneously or illegally, \* \* \* (f) on property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States. (Full text in Appellants' Brief p. 45)

These tax statutes have long been in force and effect. California Code of Civil Procedure Sec. 1252.1. (Full text in Appellants' Brief pp. 6-9) was also in effect at the time the United States acquired title to the property here in question. It stood, in our case, at and after the time of taking as the only authorization for collecting any taxes from Government acquired property. Clearly the statute forbade the court to require even so much as a pro-rate except on the basis of the subsequent fiscal year, which in our case never did begin to run so far as this parcel was concerned.

Our purpose in detailing the tax calendar and general provisions of the California statutes is to show the absurdity of appellants' contention that the vaunted tax lien, in our case, had any substance which could endure. The only logical result is that the 1955 tax lien withered on the vine and never came to such fruition as would require either the Government or the original owners to contribute \$333,164.34 to the County and City coffers.

Brief writers and decision writers have heretofore alluded to the California tax lien as an "inchoate lien". Indeed it is such during the first few months of its existence. At its inception on the first Monday in March it is no more than three lines in a code book. (Revenue

and Taxation Code, Sec. 2192). A half dozen subsequent steps by several different public officials are required before anyone knows how much is the tax on what property. Only then does the potential lien become complete.

By that time in 1955, in our case, the condemned property was exempt from taxation. No one of the seven public officials involved had authority to engage in any further taxation process upon it. In contemplation of law the levy was off the tax rolls, as Judge Carter virtually held in the judgment in the court below.

If we are right in our contention that there is no such thing as an automatic transfer of a tax lien on land to the fund deposited in court to meet the purchase price, action of the court under U. S. Code, Title 40, Sec. 258 (a) is required to accomplish this. In our case there has never been any such order.

The records show that the United States of America has held title since June 15, 1956, and no taxes have been paid.

Is the property acquired by the Government still subject to an execution duly levied as the Code provides ?  
(Revenue and Taxation Code, Sec. 2193)

Is it still subject to sale or deed to the State ?  
(Revenue and Taxation Code, Sec. 2194)

In a case such as ours, there is only one avenue of escape from such eventuality defined by the California Codes.

"Satisfaction of judgment and removal of lien.

"Except as otherwise provided in this chapter, the judgment is satisfied and lien removed when, but not before, (a) the tax is paid or legally cancelled or, (b) for nonpayment of any taxes, the property is sold to a private purchaser or deeded to the State."

California Revenue and Taxation Code,  
Sec. 2194.

Obviously, in this case, the only machinery provided by California tax law for compliance with the constitutional guaranty of non taxability which will clear the assessment rolls, is by "legal cancellation" such as was recorded by the judgment appealed from.

#### APPELLANTS' CITATIONS DISTINGUISHED

Appellants cite three California decisions in support of their byword that "the lien of taxes is held to be transferred from the land to the award on deposit with the court" (p. 12). None of them so holds.

In Weston Investment Co. v. Calif., 31 Cal. 2 390, the California Supreme Court merely says:

"Under the provisions of Section 258 (a) of Title 40 of the United States Code taxes which are a lien on property when a declaration of taking is filed may be ordered paid out of the estimation compensation fund. (Federal Citations)."  
(Emphasis added) p. 391.

In City of Los Angeles v. Superior Court, 2 Cal. 2nd, 138 the California Supreme Court quoted Sec. 1248

of the California Code of Civil Procedure and merely sustained the right of the City to withhold from the award fixed by the judgment the sum necessary to pay street assessment liens in accordance with that code provision.

In Marin Metropolitan Water District v. North Coast Water Co., 40 Cal. App. 260, the court did not, as intimated (p. 12) hold that the lien was transferred to the land. That action was by a condemner who failed to exercise the option given by Code of Civil Procedure Sec. 1248 to "deduct from the judgment" the amount of the tax lien. The court held that the condemner could not thereafter recover the amount of the taxes from the owner who had received the full amount of judgment. This case was cited with approval by the California Supreme Court in the foregoing decision, City of Los Angeles vs. Superior Court, 2 Cal. (2nd) 138.

The reasoning in both cases seems to parallel our own: Unless the condemner demands payment from the award, no obligation to pay the tax attaches to the fund or its recipient.

CALIFORNIA STATUTES DO NOT PROVIDE FOR,

BUT INSTEAD FORBID TRANSFER

It should be noted that a number of cases on which appellants rely for support of their catch phrase "transfer of lien", arise out of circumstances which clearly required resort to the fund to avoid unjust enrichment of the property owner.

In Wilson v. Belville, 47 A.C. 857, an overdue

street bond was the lien. Such also was the charge in Thibodo vs. U. S., 187 F. 2nd 249. In both cases the property owner had received the benefit of street improvements prior to the taking and the value had been increased so that the award was properly that much more than it would have been if there had been no improvement and no bond lien. In other words, here was a fully earned and fully enjoyed tax. Under Sec. 258 (a) U.S.C.A. a court of equity might well exercise its power and "transfer" the lien by directing that the tax be paid out of the fund.

May we reiterate that in all such cases there was no automatic transfer. It required exercise of the judicial function and the gist of the decisions is no more than to declare that the fund is "available" as a medium for doing justice amongst the parties.

"The status of taxes as liens is to be determined by the laws of the particular state. After the property is taken by the Government it is exempt from State taxation and this gives rise to the question as to whether the taking is within a current tax period."

U.S.v. Certain Lands, 40 F. Supp. 436 (443)

A strict analysis of the California Condemnation Statute discloses a restriction actually imposed by the legislature which a Federal court should observe. Casual observation does not show that other states have not gone to this extent in their statutes.

If California intended to transfer a lien on land and by operation of law attach it to the award to be paid by the condemner, the natural place to say so would be in Code

of Civil Procedure Sec. 1248. The actual provision is wholly inconsistent with such an intention. If a "transfer" automatically occurred there would be no option left to the condemner either to withhold the amount of the lien, as the statute in so many words authorizes, or to waive the withholding privilege. In the present case, of course, the United States did not elect to exercise such option but on the contrary took the position, correctly we believe, that there was, and is no lien because the Government acquired title prior to commencement of the fiscal year.

We discern no significance in appellants' contention that, under California State procedure, title passes at the end of the case, whereas under Federal procedure it usually passes at the commencement. California Revenue and Taxation Code, Sec. 4986, merely times the lien with reference to the date of acquisition. This would mean, on date of deed in case of voluntary sale; on date of filing and deposit in case of Federal court action; on date of final judgment in case of State court action.

California Code of Civil Procedure, Sec. 1252.1 measures the amount of the lien by reference to commencement of the fiscal year (July 1). If the year has not commenced prior to passage of title, there is no basis for collection.

#### CANCELLATION IS MANDATORY

#### ON GOVERNMENT TAKING

Appellants valiantly labor the point that California Revenue and Taxation Code Sec. 4986 uses the word "may"

instead of "shall" in providing for cancellation of taxes "by the auditor on order of the Board of Supervisors with the written consent of the district attorney."

To put their argument in reverse form, appellants contend that although concededly the Government takes title free of all taxes and tax liability, either the auditor or the board of supervisors or the district attorney by declining to concur in cancellation may compel the tax collector to treat the property as being still on the tax rolls. This, of course, would be absurd, so in spite of the general definition of "may" and "shall" (occurring some 4970 sections back in the statute) the use of the more permissive word makes the cancellation none the less mandatory. Recent decisions of the California courts confirm this construction.

Carter v. Seaboard Finance Co., 33 Cal. 2nd 564 (Syl. 10, 9B p. 573)

Hochfelder v. L. A. County, 126 Cal. 2nd 370 (Syl. 4, p. 375)

We must note a further mis-citation on the part of appellants. On page 10 of their Brief, they cite three California Supreme Court decisions in support of their contention that "may" in Section 4986 is not mandatory:

Sherman v. Quinn, 31 Cal. 2d, 661

Vista Irr. Dist. v. Supervisors, 32 Cal. 2d 477

Security First National vs. Supervisors,  
35 Cal. 2d 323.

The word is not even mentioned, the holding being that mandamus does not lie to compel cancellation where another remedy is available. (Here we had available the remedy afforded by Sec. 258, Title 40, the U.S. Code).

INVOLUNTARY SELLER IS ENTITLED  
TO JUSTICE AND REASON AS WELL  
AS VOLUNTARY

Appellants (p. 11, Brief) seek to draw a distinction between what may be "just and reasonable" where a Governmental agency deals with a land owner and where the acquisition results from negotiation and purchase as distinguished from condemnation.

In the first place, it is inconceivable that an owner would voluntarily sell land to any buyer before the beginning of a fiscal year unless the buyer assumed all responsibility for discharge of an existing tax lien, inchoate or matured. Universal custom is for a prorating if title passes after July 1st. If title passes before that date the buyer assumes all. It would be grossly unjust and unreasonable for the buyer and seller to agree upon the fair market price and then allow the buyer to deduct \$333, 164. 3 for unearned taxes not yet determined or payable. This is what appellants' proposition amounts to.

Appellants then suggest that the United States, as a negotiating buyer, could afford to pay the full market value because it could then turn around and have the tax liability cancelled. This is precisely what the court below sought to accomplish by its Summary Judgment. Undoubtedly it is what the jury would have done if the question had been left to them. The taxing authorities themselves virtually say:

"If the jury price had been an agreed price between you, we would gladly cancel the \$333, 164. 34. Since it was determined after an adversary trial, our hands are tied. "

Fortunately the court, in the exercise of its equitable jurisdiction had power to cut the knot and did so.

NO GIFT OR TAKING WITHOUT  
PROCESS INVOLVED

Appellants' final point is that the Federal Court has, by its Summary Judgment, taken property of the County and City (tax proceeds) without due process of law and has compelled a gift of it to appellees. The answer to this is simple. The constitutional provisions, state and national, establishing comity between governments, in no wise operate as gifts. This is true even though benefits to private persons may result (Cal. Emp. etc. v. Payne, 31 Cal. 2d, 216). Due process of law has been invoked in this very action and is being pursued in this appeal.

The former owners of the condemned property, appellees in the appeal of the County and the City of San Diego, (originally appellants in their own separate appeal), respectfully submit that the Judgment Nunc pro Tunc should be affirmed. Under the general powers conferred by Sec. 258 (a) U. S. C. Title 40, it provides the only just and equitable disposition of the former tax lien. Furthermore, it is in full accord with the pertinent California Codes which were in force and effect at the time of taking, in particular Revenue and Taxation Code, Sections 4986, 4986.2 and Code of Civil Procedure Sec. 1252.1.

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